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IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, and
POLICE DEPARTMENT OF THE CITY OF JACKSON,
MISSISSIPPI,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE*, THE CALIFORNIA EMPLOYMENT LAW COUNCIL, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The California Employment Law Council ("CELC") is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership comprises more than 50 private sector employers, including representatives from many different sectors of the nation's economy (aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ in excess of a half-million Americans.[1]

CELC has regularly been granted leave to proceed as *amicus curiae* in employment law cases in this Court, *see, e.g.*, *Pac. Bell v. Pallas*, 502 U.S. 1050 (1992); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. RLEA*, 489 U.S. 602 (1989); *Pac. Gas & Elec. v. Tellez*, 484 U.S. 908 (1987), and in the California appellate courts. *See, e.g.*, *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988); *Cassista v. Cmty. Foods, Inc.*, 5 Cal. 4th 1050, 22 Cal. Rptr. 2d 287 (1993); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8 (1993); *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223 (1994); *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal. 4th 93, 69 Cal. Rptr. 2d 900 (1998).

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1. Petitioners have given blanket consent to the filing of briefs *amicus curiae*, and respondents have consented to the filing of this brief. Petitioners' letter of consent is on file in the Office of the Clerk, and respondents' letter of consent is filed herewith. No party has authored this brief in whole or in part, and no party has made a monetary contribution to the preparation or filing of this brief. *See* S. Ct. R. 37.6.

This case is important to CELC's members, all of which are subject to the Age Discrimination in Employment Act ("ADEA"). While the pertinent legal authorities are examined in great and scholarly detail in respondent's brief on the merits — and CELC fully subscribes to the analysis offered in that brief — CELC and its members are particularly well-positioned to explain the practical implications of the statutory construction urged by petitioners. Because those implications are draconian, the Court should demand the clearest and most unambiguous evidence that Congress intended such a scheme. Because that evidence is absent here, the decision below should be affirmed.

ARGUMENT

The construction of a statute begins, and in most instances will end, with the statutory text. Secondary aids to interpretation are employed only when the text is inscrutable. *See BedRoc Ltd., LLC v. United States*, 124 S. Ct. 1587, 1593 (2004) (when the text of a statute is unambiguous, "our inquiry begins with the statutory text, and ends there as well"); *see also Lamie v. United States Tr.*, 124 S. Ct. 1023, 1029-30 (2004).

Petitioners, however, begin their analysis with the views of the Equal Employment Opportunity Commission ("EEOC") about the relevant language. Petitioners devote the bulk of their brief to the assertion that the agency's construction of that language is at least a creditable one, and therefore is entitled to deference from this Court. But as the Court reiterated just last Term, "deference to [the EEOC's] statutory interpretation [of the ADEA] is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1248 (2004).

In this instance, the statute's text could hardly be clearer. As then-Justice Rehnquist remarked in *Geller v. Markham*, 451 U.S. 945, 949 (1981) (opinion dissenting from denial of *certiorari*), Congress plainly did not authorize an adverse impact theory of recovery under the ADEA, an intention "revealed . . . in 29 U.S.C. § 623(f)(1), which provides that it shall not be unlawful for an employer to take any action otherwise prohibited [by the ADEA] 'where the differentiation is based on reasonable factors other than age.'" Indeed, the plain language and the structure of the ADEA compellingly show (a) that "the very essence of age discrimination" is disparate treatment, and (b) that it was this "essence [that] Congress sought to prohibit in [passing] the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Respondents skillfully parse the language and structure of the Act in their brief, and *amicus* CELC fully subscribes to that analysis. Attempting a similar effort in this brief would accomplish no purpose beyond burdening the record.

If more evidence of Congress' design is needed, however, it can be found in the unusually revealing historical path the ADEA took to enactment. The legislation resulted from an extensive study mandated by Congress and performed by the Secretary of Labor, W. Willard Wirtz. Analysis of his findings and the solutions he proposed to Congress tellingly demonstrates that Congress sought to impose statutory sanctions only for "arbitrary discrimination" — disparate treatment — and not for facially neutral rules that may disproportionately affect older workers (a complex issue expressly considered by Wirtz, for which he proposed no legislative sanction).[2]

2. *Cf. Washington v. Davis*, 426 U.S. 229, 255 (1976) (42 U.S.C. § 1981 case; it is "inappropriate simply to transfer [Title VII's adverse impact] standards . . . into a different statutory scheme having a different history") (Stevens, J., concurring).

Moreover, the adverse impact model, something of a blunt instrument even when applied to race, sex or religion (all fixed and binary characteristics) simply cannot accommodate age, a continuously and infinitely mutable variable. Applying the mechanisms of adverse impact to age produces an unworkable specie of litigation and an open invitation to just the sort of judicial micro-management of business practices against which this Court has previously warned. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices"). Although petitioners plainly are keen to have the Court ignore these practicalities, *see* Pet. Br. 10 & n.4 (asserting that it is premature to consider "judicial manageability concerns"), examining the consequences of a proposed statutory construction provides a potent "devic[e] of judicial construction [for determining a] clear sense of congressional intent." *Cline*, 124 S. Ct. at 1248. The Court will not adopt a meaning of a statute when "acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (internal citations omitted). An absurd and unworkable result is exactly what follows from petitioners' position. CELC elaborates below.

I. Congress' Treatment Of Age Discrimination And Title VII's Adverse Impact Theory Of Recovery Convincingly Show That Congress Intended No Such Theory Of Recovery Under The ADEA

A. The Secretary Of Labor Recommended, And Congress Enacted, Proscriptions Against Disparate Treatment Only

1. The Secretary of Labor's Report

At several points in the gestation of the Civil Rights Act of 1964, Congress contemplated simply adding "age" to the list of characteristics protected by that Act. *Cline*, 124 S. Ct. at 1240-41. Ultimately, however, Congress concluded that it needed more information about the differences between age discrimination and the forms of discrimination prohibited by the 1964 Act. *See EEOC v. Wyoming*, 460 U.S. 226, 229 (1983). Congress accordingly directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age. . . ." Pub. L. No. 88-352, § 715 (1964). Congress directed the Secretary to "include in [his resulting] report recommendations for legislation to prevent arbitrary discrimination in employment because of age." *Id.*

The report, delivered a year later, underscored the fundamental distinction between the problems of race, sex, and religious discrimination — addressed by the 1964 Civil Rights Act — and the "age question":

> The Nation has faced the fact . . . that . . . ability . . . is unrelated to . . . race, or color, or religion, or sex, or . . . geography. . . . Having accepted this

truth, the easy thing to do would be simply to extend [these] conclusions . . . to the problem of discrimination based on aging, and be done with the matter. This would be easy — and wrong.

Employment discrimination because of race is identified . . . with feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned.

The most closely related kind of discrimination in the non-employment of older workers involves their rejection **because of assumptions about the effect of age on their ability to do a job** *when there is in fact no basis for these assumptions.* It is this which Congress refers to, in Section 715 of the Civil Rights Act, as "arbitrary discrimination."

W. Wirtz, *The Older American Worker: Age Discrimination in Employment Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964,* at 1-2 (hereafter referred to as the "Wirtz Report") (reproduced in the Joint Appendix ("J.A.") (J.A. 36-37)) (italics in original, bold added).

This "arbitrary discrimination," the Secretary concluded, formed the most conspicuous barrier to the employment of older workers. This "most obvious kind of discrimination [typically] takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." *Id.* at 6 (J.A. 44). Thus, the Secretary concluded that a statute prohibiting disparate treatment was needed — that a "clear-cut and implemented

Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age." *Id.* at 22 (J.A. 80).

The Secretary recognized, however, that other employment practices existed "*which quite unintentionally lead to limits in hiring*," *i.e.*, practices, though fair in form and innocent in design, that nonetheless have an adverse impact on older workers. *Id.* at 22 (J.A. 80) (emphasis added). These practices, though perhaps adopted for benign, even salutary reasons, nonetheless "indirectly . . . operate[d] with some force against older workers." *Id.* at 15 (J.A. 66).

But the Secretary recommended no statutory proscription to end such practices. Instead, the Secretary recommended a variety of educational and advisory programs designed "to *encourage* new kinds of employer and union actions." *Id.* at 22 (J.A. 80) (emphasis added). Among other things, the Secretary suggested that Congress "study . . . the feasibility of a system of portable pension credits," encourage "[n]ew forms of private annuity coverage for older workers," conduct a "comprehensive formal review of the gaps and inadequacies of the present system of workmen's compensation and disability insurance," and others. *Id.* (J.A. 81).

2. The Resulting Legislation

Largely adopting the structure and content of the Secretary's suggestions, Congress enacted the Age Discrimination in Employment Act of 1967. Just as the Secretary's report had recommended, the bill contained statutory *proscriptions* on "arbitrary discrimination" against older workers, and cooperative programs and education to ameliorate the impact of employment practices "*which* . . .

unintentionally . . . limit[]" employment opportunities for those over 40. Specifically, to curb disparate *treatment* of older workers, Congress aimed "to *prohibit arbitrary age discrimination in employment*." 29 U.S.C. § 621(b) (emphasis added). As for those "institutional arrangements" that "*indirectly* . . . operate[d] with some force against older workers" — adverse impact — Congress envisioned a variety of voluntary, cooperative outreach and educational programs "to *promote* employment of older persons based on their ability rather than their age; [and] to *help* employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.*[3]

The import of this history is clear. The Secretary recognized that the problem of age discrimination has two separate dimensions. First, there existed pervasive "arbitrary discrimination" — intentional discrimination — most frequently taking the form of explicit limits on the age of acceptable applicants. For this type of disparate treatment, the Secretary recommended, and Congress enacted, an express statutory prohibition. Second, the Secretary recognized that other types of employer practices — adopted for innocent, and at times laudable reasons — nonetheless had an adverse impact on the older worker. For this problem, the Secretary recommended, and Congress adopted, a program of study, encouragement, and facilitation, intended to develop suitable alternatives to existing practices. Indeed, in a letter to the leaders of the House and Senate accompanying his legislative proposals, Wirtz explained that the bill would "provide[] for attention . . . to institutional arrangements that work to the disadvantage of older workers

3. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (2000) (statutory findings and articulation of purpose form a reliable guide to defining the scope of anti-discrimination legislation).

[but that] reasonable differentiations not based solely on age . . . *would not fall within the proscription*" of the legislation. 133 Cong. Rec. 1377 (1967) (Wirtz letter to J. McCormack, Jan. 23, 1967). Thus, while research "would be undertaken and promoted with a view to reducing [these institutional] barriers to the employment of older workers," *id.*, wholly absent from the statute is a private right of action to address unintentional adverse impact.

B. Congress' Treatment Of Adverse Impact Issues In The Civil Rights Act Of 1991 Demonstrates That It Did Not Intend That Theory Of Liability To Apply Under The ADEA

Congress codified the adverse impact theory for Title VII cases in the Civil Rights Act of 1991. Three aspects of Congress' consideration of that legislation help illuminate why no adverse impact theory exists in ADEA cases.

First, the dominant feature of the 1991 Act was its remaking of Title VII adverse impact theory in response to this Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Most significantly, Congress shifted the burden of proof *from the plaintiffs* — who bore the burden under settled law at the time of the Act (under *Wards Cove*) — *to the defendant* with respect to the critical "job relatedness" question. 42 U.S.C. § 2000e-2(k)(1)(A)(i). But it made this fundamental change in law of adverse impact *only as to Title VII*, even though the lower courts were then applying *Wards Cove* to ADEA cases.[4]

4. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1369-72 (2d Cir. 1989); *see also MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 771-73 (11th Cir. 1991); *Davidson v. Bd. of Governors*, 920 F.2d 441, 444 (7th Cir. 1990); *Abbott v. Fed. Forge, Inc.*, 912 F.2d 867, 873-75 (6th Cir. 1990).

Second, the CRA 1991 confirmed that judges, and not juries, were the right fact-finders to consider Title VII adverse impact cases. 42 U.S.C. § 1981a(c). But ADEA trials are jury trials. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), *codified at* 29 U.S.C. § 626(c)(2). If Congress had believed that (a) adverse impact claims were viable under the ADEA; and (b) that judges, not juries, should hear those cases, it would have amended the ADEA to say so. It amended the ADEA on *other* matters, but not on this one.

Third, the 1991 Act was enacted in the face of growing judicial skepticism about the applicability of the theory under the ADEA, initially exemplified by Chief Justice Rehnquist's opinion in *Markham,* 451 U.S. at 949 (dissenting from denial of *certiorari*), and the courts of appeals had begun to express their own doubts.[5] If Congress had intended the adverse impact theory to be available to age plaintiffs, one might have expected Congress to take the occasion to say so. This is particularly true in light of the fact that the primary animating purpose for the Act was to codify certain aspects of the theory as it applies to Title VII.

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5. *See, e.g., Arnold v. United States Postal Serv.*, 863 F.2d 994, 998 (D.C. Cir. 1988) (noting the issue and citing then-Justice Rehnquist's *Markham* opinion but declining to resolve the issue), *cert. denied*, 493 U.S. 846 (1989); *Davidson*, 920 F.2d at 444 (same); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1428 (7th Cir. 1986) ("adverse impact analysis developed in Title VII cases cannot be extended easily to age cases."); *see also Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220-21 (7th Cir. 1987) (Easterbrook, J., dissenting) (the "language, structure and history of the ADEA have led thoughtful people to conclude that disparate impact analysis is inapplicable in ADEA cases.'").

To accept petitioners' argument, then, one must be prepared to accept that Congress wanted adverse impact cases of every sort *except for age cases* to be tried to the bench, instead of to juries. And one must also accept that Congress, although animated to overrule this Court's decision in *Wards Cove* regarding the burden of proof in Title VII adverse impact cases, was content to leave *Wards Cove* as the law for such cases under the ADEA. The argument is not plausible. Petitioners — whose argument is premised largely on the notion that Congress intended the ADEA and Title VII to be treated identically for adverse impact purposes — do not explain why Congress might have desired these two statutes to be treated so differently in these two central respects. In fact, the most sensible conclusion to draw from the 1991 Act is that Congress omitted reference to ADEA adverse impact claims because it never supposed that such claims existed in the first place.

II. Age, As A Protected Characteristic, Is Fundamentally Different From Those Protected By Title VII, And Congress Could Not Reasonably Have Intended The Modes Of Proof Adopted For The Latter To Apply To The Former

A. Age Is Different

Aside from its fixation on the EEOC's guidance, the dominant theme in petitioners' brief is the refrain that the prohibitory language of the ADEA was adopted *in haec verba* from Title VII, and therefore should be given an identical reading. Although Section 4(a) of the ADEA was borrowed word-for-word from Title VII and sets out a list of "employer practices" proscribed by the statute, Section 4(f) — unique to the ADEA — *contracts* the breath of the

language of Section 4(a) by delineating a variety of lawful employment practices. Thus, only *read together* do Sections 4(a) and (f) "descri[be] the type of employer conduct that [the Act] prohibit[s]." *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 181 (1989). As the Court explained in *EEOC v. Wyoming*, 460 U.S. at 232-33, in describing Section 4(f):

> [I]n order to insure that employers were permitted to use neutral criteria not directly dependent on age . . . the Act provide[s] that certain otherwise prohibited employment practices would not be unlawful . . . "where the differentiation is based on reasonable factors other than age."

And the statutes fundamentally differ beyond their language. Title VII is premised on the conviction that native intelligence, talent and ability are not found exclusively or even primarily among any one race, color, gender, or religion, or those claiming any one national origin. Because these employment-related attributes are distributed among individuals of both genders and all racial and religious groups, we presume that when employers focus exclusively on merit, the result will be a workforce in which opportunities exist for all. As a society, we presume that there is almost never any rational connection between an individual's race or sex and the ability to perform in the workplace. Thus, the theory goes, there should be few instances in which a facially neutral employment practice bears more heavily on one religion, one gender, or one race, than another, and one may naturally be suspicious when a practice does have such an impact. That skepticism is embodied in Title VII's adverse impact mode of proof, which forces an employer to show the work-related merit of any such rule or practice when a gender or racial disparity results. The burden this sort of

analysis imposes on employers is ameliorated by the very rarity with which racial or gender disparities ought to occur.

But age is different.[6] Although the "legislative history of the ADEA repeatedly emphasize[s that] the process of psychological and physiological degeneration caused by aging varies with each individual,"[7] *on average* — as a statistical matter — there can be no denying the physiological fact that the aging process incrementally degrades human physical prowess and the acuity of the senses. *See, e.g., Vance v. Bradley,* 440 U.S. 93, 121 (1979) ("[A]ge, unlike sex, [race, or national origin,] is at some point likely to bear a relationship to ability."); *see also Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) ("mental capacity"); *Murgia*, 427 U.S. at 317 ("physical ability"). And while the ADEA was enacted to ensure that employers would assess the capacities of their older workers on an *individualized* basis — eschewing beliefs about the *category* of older workers in favor of evidence

6. "[W]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [O]ld age does not define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.' Instead it marks a state each of us will reach if we live out our normal span." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (citations omitted); *see also Dockins v. Benchmark Communications*, 176 F.3d 745, 749 (4th Cir. 1999) ("Thus, every individual speaks [about age] with the knowledge that there with the grace of God go I.").

7. *Cline*, 124 S. Ct. at 1244 (quoting *Western Air Lines v. Criswell*, 472 U.S. 400, 409 (1985)).

about the *individual* — non-age factors having differential age-specific impacts are "ubiquitous and inescapable." *Cunningham v. Cent. Beverage, Inc.*, 486 F. Supp. 59, 62 (N.D. Tex. 1980) (Higginbotham, J.) (citation omitted); *see also* Wirtz Report at 1-2 (J.A. 37-38) ("[T]here is in fact a relationship between . . . age and . . . ability to perform [on] the job. . . . [This relationship] *clearly does exist* so far as the age question is concerned, *but does not exist* so far as, for example, racial or religious discrimination are concerned.").[8]

Moreover, there will inevitably be correlations between (a) age and (b) experience (which typically correlates *positively* with advancing age), and facility with new technologies (which may well militate, on an aggregate basis, in favor of the young). As Judge Posner has colorfully observed, "[e]veryone knows that younger people are on average more comfortable with computers than older people are, just as older people are on average more comfortable with manual-shift cars than younger people are." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir.) (rejecting testimony of proffered statistical expert because he failed to examine relationship between "age [and] legitimate job-related qualification[s], such as familiarity with computers"), *cert. denied*, 521 U.S. 1104 (1997).

Even apart from these performance-related standards, "virtually all elements of a standard compensation package are positively correlated with age." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). Thus,

8. "The process of aging is inescapable, affecting everyone who lives long enough. It is gradual, minimizing and obscuring differences among people." Wirtz Report at 6 (J.A. 44).

when an employer acts to trim costs — sometimes a painful necessity for a business — adverse impact on more senior (and therefore likely older) workers is all but inevitable. *See, e.g., id.* at 1164-65 (reducing maximum vacation allowance had an adverse impact on older workers, as would across-the-board pay cuts); *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 743 (E.D. Pa. 1985) (salary caps adversely affected senior, and therefore older, teachers); *see also Metz*, 828 F.2d at 1214 (Easterbrook, J., dissenting) (decision to "close a plant or curtail its operations because of high wage costs" would have impact on older workers). Consider an employer that needs to cut $200,000 from its payroll. It can either cut (a) one $200,000 job; (b) two $100,000 jobs; or (c) eight $25,000 jobs. Seeking to minimize the number of job losses, and without ever even thinking about the ages of the incumbents in those jobs, the employer may well opt for either plan (a) or (b). Petitioners' theory would put the employer at legal jeopardy if, as likely would be the case, the highest-salaried jobs are held by older workers.[9]

Unlike with Title VII, where racial, religious, or gender disparities are presumed to be both few and inherently suspicious, age-correlated disparities in the workplace are almost certain to be both innocent and commonplace — a fertile growth medium for adverse impact litigation. Attempting to downplay this ominous fact, petitioners

9. In the instant case, similarly, respondents allocated more of its available funds for pay increases for police officers to its junior officers, whose pay respondents concluded was below-market, rather than to its most senior, and therefore highest paid, officers, for whom no market-based disparity existed. Because the senior officers were relatively older than the junior officers, petitioners alleged that the decision was proscribed by the ADEA.

reassuringly predict that the success rate of plaintiffs in ADEA adverse impact cases will be relatively low "because the impact of neutral policies which fall disproportionately on class members protected by the ADEA can be proven to be related to legitimate business reasons in more instances than those which might impact other protected groups." Pet. Br. 10 n.4 (citations omitted).

One might reasonably wonder why Congress would have felt it necessary to adopt so far-reaching a theory of recovery for the ADEA with the expectation that employers would almost always win when those cases were brought. This is particularly true in light of the fact that the "*essence* [of the evil] Congress sought to prohibit in [passing] the ADEA" was disparate *treatment*.[10] Petitioners would ascribe to Congress a secondary, non-"essential" purpose of attaching legal jeopardy to — and hence effectively proscribing — a set of facially benign practices through an enormously burdensome and expensive form of litigation that plaintiffs almost never would win.

And even if it were true that defendants usually would win on the merits, litigation is costly, and class litigation can be ruinously so. The potential damages in a discrimination class action can push defendants to settle even the weakest of claims. *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (pressure to settle class claims can be almost irresistible "even when the plaintiff's

10. *Cf. Gen. Bldg. Contractors Ass'n v. Penn.*, 458 U.S. 375, 387-88 (1982) ("The immediate evils with which the Thirty-ninth Congress was concerned simply did not include practices that were 'neutral on their face'"; "To infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern").

probability of success on the merits is slight.") *See also* Advisory Committee Notes to 1998 Amendments to Fed. R. Civ. P. 23(f) (threat posed by class litigation can "force a defendant to settle rather than incur the costs of defending . . . and run the risk of potentially ruinous liability"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 163-64 (3d Cir. 2001) (noting "hydraulic" pressure to settle).

No matter what result the defendant theoretically could obtain in court, the specter of these cases — even when the employer could "win" — means massive distraction and disruption to the mission of the enterprise. Under these circumstances, repeated defense "victories" would be Pyrrhic. Absent clear direction from Congress (not present here), the Court should be reluctant to adopt a construction of the statute that essentially guarantees that everyone comes out a loser.

B. Unlike The Characteristics Protected By Title VII, An "Age Class" Would Be Malleable And Subject To Gerrymandering, Making An Employer's Task In Avoiding, Or Defending, Litigation Almost Impossible

Conceptually at least, it is a relatively simple matter to determine whether a rule has an adverse impact on members of one gender, race, or religion.[11] Because these characteristics are binary in nature — *e.g.*, one is either female or not — it

11. As a practical matter, of course, such an analysis can be exceptionally challenging. Any competent regression analysis must account for the major non-discriminatory factors that influence employee success, and many, perhaps even most, of those will be impossible to quantify in a way that makes them susceptible to statistical analysis. *See Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 995-97 (1988).

is relatively straightforward to compare the success rates of those within the protected group to those outside the group.

Age is not so simple. Ages are infinitely variable and constantly changing. Attitudes towards those over 80 are substantially different than towards those aged 40-45. Rather than a "discrete and insular" minority, old age refers simply to "a state each of us will reach if we live out our normal span." *Murgia*, 427 U.S. at 313-14; *see also Dockins*, 176 F.3d at 749. With a large and complex piece of class litigation, many of those of the "favored" age at the inception of the case may well be within the *disadvantaged* group by the time a case gets to trial.

This fluidity would pose significant complexities for class litigation. How does one define the group harmed? The statistics may suggest an employer's practice has an adverse impact on employees over 52, but not on those between 40 and 52. *See, e.g., Lowe*, 886 F.2d at 1373. Or, the statistics may show disadvantage to those between the ages of 52 and 59 when compared to younger workers, but that those *over* the age of 59 are treated *favorably*. Although this pattern — with the oldest workers receiving the most favored treatment — cannot be age discrimination in any sense that Secretary Wirtz, or the 88th Congress, would have recognized, the EEOC has insisted in litigation that the Act provides for precisely this sort of "banding," *i.e.*, that the Act allows a plaintiffs' counsel to manipulate the statistics until he or she finds an age cohort that is less well off when compared to some other, younger cohort. *See, e.g., EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950-51 (8th Cir. 1999). Thus, an adverse impact case would be available to "redress" a disparity observed between, for example, the treatment of those age 51½ years old through age 56 when compared to

those under 40, even when the over-40 protected class as a whole is treated favorably. As the Second Circuit observed in *Lowe*:

> Under this approach, . . . any plaintiff can take his or her own age as the lower end of a "sub-protected group" and argue that said "sub-group" is disparately impacted. If appellants' approach were to be followed, an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the "sub-group" of those age 85 and above, even though all those hired were in their late seventies. . . . We find no support in the case law or in the ADEA for the approach to disparate impact analysis appellants advocate.

886 F.2d at 1373.[12]

No circuit has yet adopted the EEOC's conception of the adverse impact theory, but the alternative adverse impact approach is no better. The alternative adopted by some courts has been to treat age artificially as a binary characteristic like gender, *i.e.*, to ask simply whether those age 40 and over,

12. As the Court has previously warned in its Title VII cases, the focus in adverse impact claims on statistical balance makes it all too attractive for employers to insulate themselves from liability by adopting quotas forbidden by the statute. *See Wards Cove*, 490 U.S. at 652-53; *Watson*, 487 U.S. at 992-94. Were the Court to adopt the EEOC's specie of adverse impact analysis to claims under the ADEA, even this stratagem would be unavailable; employers would have to ensure that employment opportunities were allocated proportionately to those of every age — 48 year olds, 49 year olds, 50 year olds, on through to its most senior employee. Even the most quota-oriented employer could not make these numbers work.

as a block, have been treated less well than those under 40. *See, e.g., Lowe*, 886 F.2d at 1373; *McDonnell Douglas Corp.*, 191 F.3d at 950-51. But "the ADEA prohibits discrimination on the basis of age and *not class membership*." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (emphasis added). "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*." *Consolidated Coin*, 517 U.S. at 312 ("to put it concretely, there can be no greater inference of *age* discrimination (as opposed to '40 or over' discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.") (emphasis in original).[13]

Under this approach, a group of plaintiffs could make out an adverse impact claim where an employer's practices give substantial *preferential* treatment to those over 50, so long as there are enough adversely treated employees between 40 and 50 to make the entire over-40 protected class *appear* less well off than those under 40. This cannot be; just last Term, this Court held in *Cline* that the Act protects older workers from relative disadvantage at the expense of the younger, but that the converse is *not* true. A conception of the Act that would find discrimination where the oldest workers are *favored* cannot be reconciled with the rule in *Cline*.

In sum, those determined to force fit the adverse impact theory into the ADEA have two equally unappealing

13. *See also Cline*, 124 S. Ct. at 1244 (explaining the Court's "consistent understanding that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young [persons over the age of 40 complaining about favorable treatment of still older individuals] outside the statutory concern").

alternatives: treat the 40-and-over group as an undifferentiated mass (and thereby treat as age discrimination certain statistical arrays that plainly show no adverse impact against *older* workers in the sense contemplated by *Cline*), or permit plaintiffs to slice and dice the employer's age cohorts until they find a band — and, without rigorous management-by-quota they often will — that, statistically, failed to get its share of whatever benefit is at issue.[14] Either interpretation would do violence to the Court's prior cases and to the evident concerns that motivated Congress.

III. In ADEA Adverse Impact Cases, There Would Be A Particular Danger That Juries Would Second Guess Employer Business Judgment; Congress Did Not Intend This Result

In Title VII cases (and presumably under the ADEA if the Court were to reverse the court of appeals here), an employer can lose an adverse impact case even when its business practices have been shown to be "job related" and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Watson*, 487 U.S. at 1005-06 (Blackmun, J., concurring). Plaintiffs win if they can "show that other [alternative practices rejected by the employer], without a similarly undesirable . . . effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

14. Few employers have access to the sort of sophisticated statistical expertise needed to run the universe of regression analyses a plaintiffs' counsel might seize upon. This is especially true for small businesses (the ADEA covers all employers with more than 20 employees).

. This aspect of the adverse impact doctrine has always been problematic for employers, because without careful limits, it naturally would lead to a degree of judicial second-guessing as to which alternatives really might have been equally effective in serving the employer's "legitimate interests." But this Court has cautioned the lower courts that they "are generally less competent than employers to restructure business practices, [and therefore] the judiciary should proceed with care before mandating that an employer . . . adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit." *Wards Cove*, 490 U.S. at 660-61 (quoting *Furnco*, 438 U.S. at 578). The relevant reported cases appear to reflect that the courts have implemented this guidance with prudence and restraint.[15]

But, as noted above, Title VII adverse impact cases — and thus the "alternative practices" inquiry — are tried to federal district judges, not the juries that would hear ADEA claims. And because hard economic choices often will impact high-wage (and presumably more senior) workers disproportionately, an ADEA disparate impact theory would mean that employers would repeatedly be put to the task of explaining their business rationale to juries, even for the most intractable business problems that have no "right" solution. *See, e.g., Metz*, 828 F.2d at 1214 (Easterbrook, J., dissenting) (decision to "close a plant or curtail its operations because of high wage costs" would have an adverse impact on older workers). Should the employer have taken across-the-board

15. *See Watson*, 487 U.S. at 999; *see also Hack v. President & Fellows of Yale College*, 237 F.3d 81, 101 n.18 (2d Cir. 2000), *cert. denied*, 534 U.S. 888 (2001); *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989); *Bernard v. Gulf Oil Corp.*, 890 F.2d 735, 744 (5th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *Worthy v. United States Steel Corp.*, 616 F.2d 698, 704 (3d Cir. 1980).

pay cuts rather than trimming salaries for its highest-cost (and oldest) workers? Should it have increased medical insurance co-payments or should it have eliminated signing bonuses for on-campus recruits instead? Should the company have closed the local plant or the one in the next state, or the next time zone? Would it have been wiser to keep jobs in a restructuring (rather than subcontracting), if the cost difference could have been bridged by selling the executive jet and canceling some TV advertising? The Third Circuit has examined the problem:

> [I]f an employer set the work week at five days per week, eight hours per day, or if it determined to eliminate medical insurance coverage, its decisions could have a disparate impact on older employees. In that circumstance, in an ADEA action *employers would be forced to justify their business practices with older employees then having the opportunity to demonstrate that alternative employment practices could fulfill the employer's needs. Such a regime could subject employers to unreasonable intrusions by juries into their business practices.*

DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 734 n.21 (3d Cir. (internal citations omitted) (emphasis added), *cert. denied*, 516 U.S. 916 (1995).

Although a jury can be instructed that a disparity must be proven — that they may not "vault over the initial inquiries and rest [their verdict] entirely on the existence of alternatives," *Price v. City of Chicago*, 251 F.3d 656, 660 (7th Cir. 2001) — juries fed on popular press accounts of exorbitant CEO pay and executive malfeasance will be

tempted to look past disputed evidence about the existence of statistical disparities and move straight to the question whether more "equitable" alternatives to hard business choices existed. They will be hard pressed to refrain from "restructuring the employer's business practices," even where no convincing evidence of a disparity exists. There is simply no evidence that Congress intended the ADEA to serve as the sort of blunt instrument of social and economic policy petitioners urge on the Court.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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